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**REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES**

PROPOSED POLICE PERMIT FOR THE SALE OF TOBACCO PRODUCTS

INTRODUCTION

This report addresses a proposal to amend the San Diego Municipal Code to create a requirement that a person who operates as a tobacco retailer, as defined in the proposed ordinance, have a police permit. Failure to have a permit would be a misdemeanor. In addition, a violation of the conditions of the permit could lead to either or both administrative action or criminal prosecution.

Adoption of the proposal will provide a further tool that may be used to prevent the unlawful sale of tobacco products to minors. The sale of tobacco products to minors has significant consequences, including illnesses such as cancer and lung disease, increased drug use, poor performance in school, and other similar consequences. State law currently makes it illegal to sell tobacco products to minors. In addition, Assembly Bill (AB) 71, which went into effect June 2004, created state licensing requirements of all tobacco retailers in the State of California.

Proponents of the proposed local ordinance assert that even with existing state laws, local legislation is needed to address the illegal sale of tobacco products to minors. Proponents, in support of the proposed ordinance, point to a March 2004, survey by the American Lung Association of San Diego and Imperial Counties carried out in San Diego County which showed that as many as 43.9 percent of 244 stores surveyed in the City of San Diego sold cigarettes to minors. It is the opinion of the City Attorney that the proposed ordinance is a lawful exercise of the City's police power to protect the public health, public morals, and safety of its citizens, in particular of its minors.

BACKGROUND

The proposed ordinance would require any person who sells tobacco products to obtain a police permit to operate as a tobacco retailer. Failure to obtain a permit would be a misdemeanor offense. In addition, the proposed ordinance provides for fines, suspensions, and revocations for violating the terms of a police permit. The purpose of the proposed ordinance is to deter illegal sales and to hold those who engage in such illegal sales accountable for their actions. Studies support the use of such local regulation.

According to the *Fact Sheet: Tobacco Sales to Youth* from the California Department of Health Services, CDIC/Tobacco Control Section, dated November 2003, the following are some reasons why tobacco retailers should be licensed: (1) tobacco is a harmful product which is highly addictive and responsible for 40,000 deaths in California annually and 440,000 nationally; initial tobacco use almost exclusively occurs in teenage years; (2) the usual source of tobacco for 36% of established daily teen smokers in California is from the retail environment; (3) eliminating tobacco sales to teens interrupts and breaks the chain of progressive addiction, in which a youth progresses from experimenting with tobacco to becoming an addicted smoker; (4) communities with comprehensive tobacco control programs and enforcement have lower youth smoking rates than communities without comprehensive tobacco control programs.

The State has attempted to curb illegal sale of tobacco product to minors, but proponents argue that the state laws have been insufficient. Currently, under California Penal Code section 308 it is illegal to sell tobacco products to minors. Also, Assembly Bill 71, which went into effect June 2004, created a state licensing program for tobacco retailers. Under the state licensing program tobacco retailers are required to obtain a state permit to sell tobacco products. The tobacco retailer who violates the conditions of the permit may be fined or have his or her permit suspended or revoked. Notwithstanding state law, proponents argue that state law is insufficient and that local regulation is required.

Proponents argue that tobacco retailers continue to sell tobacco products to minors and point to a March 2004 survey by the American Lung Association of San Diego and Imperial Counties carried out in San Diego County which showed that as many as 43.9 percent of 244 stores surveyed in the City of San Diego sold cigarettes to minors. Proponents also argue that AB 71 is insufficient for several reasons, including: (1) it would take four convictions for selling tobacco to minors before a suspension could take place; (2) there is no funding in place for enforcement; and (3) the priority of AB 71 is to address cigarette smuggling, not sale to minors. <http://www.californialung.org/thecenter/legislative/ab71QA.htm>.

Finally, many local governments have passed similar ordinances. They include: Antioch, Brentwood, Clayton, Colima, Concord, Contra Costa County, Daly City, Danville, East Palo Alto, El Cerrito, Goleta, Lafayette, Los Angeles, Martinez, Millbrae, Oakley, Orinda, Pinole, Pittsburg, Pleasant Hill, Rancho Mirage, Redwood City, Richmond, Roseville, San Carlos, San Fernando, San Mateo, San Mateo County, San Rafael, Santa Barbara County, Walnut Creek, and (most recently) El Cajon.

DISCUSSION

THE PROPOSED ORDINANCE IS A LAWFUL EXERCISE OF THE CITY'S POLICE POWER TO PROMOTE THE PUBLIC HEALTH, PUBLIC MORALS, AND PUBLIC SAFETY

The proposed ordinance is a lawful exercise of the City's police power: (1) because the ordinance is not preempted by state law and (2) because the prohibition is rationally related to the public safety objective it seeks to address.

I. Preemption

The proposed ordinance seeks to create a requirement that a person who operates as a tobacco retailer, as defined in the proposed ordinance, have a police permit. The proposed ordinance is not preempted by state law.

“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const. art. XI, § 7. Currently, state law exists which regulates the sale of tobacco products to minors. First, California Penal Code section 308 makes it a crime to sell tobacco products to minors. In addition, recently chaptered Assembly Bill 71 has created state licensing requirements of all tobacco retailers in the State of California. These two state regulations do not preempt the proposed ordinance.

First, the California courts in cases such as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985) and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of the local governments to regulate business activity in order to discourage violations of the law. As a result, because the purpose and effect of the proposed ordinance is to ensure that violations of Penal Code section 308 and other tobacco control laws are curtailed, the proposed ordinance is not preempted by state law.

Second, there is no preemption when a state legislative scheme either permits or recognizes local regulation. *Candid Enterprises Inc. v. Grossmont Union High School District*, 39 Cal. 3d 878, 888 (1985); *People ex rel. Deukemejian v. County of Medocino*, 36 Cal. 3d 476, 485 (1984). AB 71, which created a state licensing scheme for tobacco retailers, specifically permits local governments to create their own tobacco retailer licensing schemes so long as they do not involve the collection of state taxes. See Cal. Bus. & Prof. Code § 22971.3. As a result, the proposed ordinance is not preempted by state law.

II. Due Process and Equal Protection

Tobacco use by minors has significant impacts on the health and well being of minors. For example, tobacco use is responsible for many significant consequences, including illnesses such as cancer and lung disease, increased drug use, poor performance in school, and other similar maladies. In addition, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation. Thus, if such use is curtailed, then minors are likely not to use tobacco at all. To prevent the aforementioned consequences, the proposed ordinance seeks to create a requirement that all persons who sell tobacco products have a police permit. The purpose of such a requirement is to ensure that persons who are willing to sell tobacco products to minors are discouraged from so doing and to provide a mechanism to hold those that do sell tobacco products accountable for their actions. For example, among the reasons to deny a permit, or if a permit has been issued, to suspend or revoke the permit, are whether the person has been convicted of various tobacco control laws, including Penal Code section 308, and whether the person has had a similar permit or license denied, suspended, or revoked.

A police power regulation will be upheld as reasonable if the requirements of the law have a rational connection with the promotion and protection of public safety. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Thus, laws which do not affect any fundamental rights such as voting or the freedom of speech and do not make a “suspect classification” such as a law based on race or nationality, are tested by determining whether it has a rational relationship to a legitimate state interest. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977). The rational basis analysis is used under either the guarantee of the due process or equal protection clauses because no fundamental right or suspect classification is involved. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *see also, Dandridge v. Williams*, 397 U.S. 471, 503 (1970). Finally, laws which do not impact a fundamental right are entitled to a strong presumption of constitutionality. *McGowan v. Maryland*, 366 U.S. 420, 449 (1961).

Here, tobacco use by minors presents a significant health and safety issue for the City of San Diego. The proposed ordinance seeks to curb tobacco use by minors by ensuring that persons who are willing to sell tobacco products to minors are discouraged from so doing and to provide a mechanism to hold those that do sell tobacco products accountable for their actions. As a result, the ordinance is a lawful and rational exercise of the City’s police power.

CONCLUSION

Tobacco use by minors presents significant problems which impact public health, welfare, and safety. By passing the proposed ordinance, the illegal sale of tobacco products to

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minors is discouraged and those who sell such products are held accountable for their actions. Such an ordinance is a proper use of the City's police power.

Respectfully submitted,

CASEY GWINN
City Attorney

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